82-5328

No. 81-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

DONALD WAYNE THOMAS

Petitioner,

-against-

WALTER D. ZANT,
Superintendent
Georgia Diagnostic and
Classification
Center

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF BUTTS COUNTY, GEORGIA

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QUESTIONS PRESENTED

1. Whether petitioner was denied due process of law by the trial court's failure to conduct an evidentiary hearing and make a finding as to his competency to stand trial where the psychiatrists who reported to the court diagnosed petitioner as schizophrenic and were evenly divided in their opinions as to his competency and where there was evidence that petitioner had engaged in bizarre and irrational behavior?

2. Whether instruction of the jury in the bare words of a statute authorizing the death penalty for any murder found to be "outrageously or wantonly vile, horrible or inhuman, in that it involved torture and depravity of mind" satisfied the requirements of the Eighth and Fourteenth Amendments that consideration of the death penalty be guided by clear and objective standards?

3. Whether the Georgia courts have adopted such a broad and vague construction of the terms "torture" and "depravity of mind" in upholding petitioner's sentence of death as to violate the Eighth and Fourteenth Amendments to the Constitution?

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OPINION BELOW

The decision of the Superior Court of Butts County is appended to this petition at 1a. It was not reported. The Supreme Court of Georgia denied an application for a certificate of probable cause to appeal, thereby declining to review the decision of the Superior Court of Butts County. The order of the Georgia Supreme Court denying the application is appended to this petition at 22a.

JURISDICTION

The decision of the Superior Court of Butts County was entered March 10, 1982. Petitioner sought review of the decision by the Supreme Court of Georgia. That court denied an application for probable cause to appeal on June 2, 1982. Appendix at 22a. Said denial of an application for probable cause to appeal operates to deny petitioner any review of the decision of the Superior Court of Butts County by a state court

in Georgia. Jursidiction of this Court is invoked under 28 U.S.C. § 1257(3), petitioner having asserted below and asserting here a deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

The Eighth Amendment provides:

> Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishments inflicted.

The Fourteenth Amendment provides in relevant part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . ."

This case involves the seventh aggravating circumstance of Georgia's death penalty statute, Ga. Code Ann. § 27-2534.1 (b)(7), which provides for the death penalty where:

> The offense of murder, rape, armed robbery or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

This case also involves Georgia's statute pertaining to one's competence to stand trial, Ga. Code Ann. § 27-1502, which provides:

> (a) Whenever a plea is filed that a defendant in a criminal case is mentally incompetent to stand trial, it shall be the duty of the court to cause the issue of the defendant's mental competency to stand trial to be first tried by a special jury. If the special jury finds the defendant mentally incompetent to stand trial, the court shall retain jurisdiction over the defendant, but shall transfer the defendant to the Department of Human Resources.

(b) Within 90 days after the Department of Human Resources has received actual custody of a person pursuant to subsection (a), such person shall be evaluated and a diagnosis made as to whether the person is presently mentally incompetent to stand trial and if so, whether there is a substantial probability that the person will attain mental competency to stand trial in the foreseeable future. If the person is found to be mentally competent to stand trial, the department shall immediately report that finding and the reasons therefore to the committing court and the person shall be returned to the court as provided in subsection (e).

(c) If the person is found to be mentally incompetent to stand trial by the Department of Human Resources and there is not a substantial probability that the person will attain competency in the forseeable future, the department shall report that finding and the reasons therefore to the committing court and the person, providing that such person meets the criteria for civil commitment, shall thereupon be civilly committed to a State institution . . .

. . .

(e) A person who is found by the Department of Human Resources to be mentally competent to stand trial shall be discharged into the custody of a law enforcement officer of the jurisdiction of the court committing such person to the department, . . .

(f) Any person returned to the court as provided in subsection (e) shall again be entitled to file a special plea hereunder.

STATEMENT OF THE CASE

Donald Wayne Thomas seeks a writ of certiorari from this Court to the Superior Court of Butts County, Georgia, to review a decision of that court denying his application for a writ of habeas corpus.

Mr. Thomas asserted in the court below that he was being wrongfully detained by the respondent pursuant to a conviction of murder and sentence of death which were imposed upon him by the state of Georgia in violation of rights guaranteed by

the Constitution of the United States, and asked that court to vacate his conviction and sentence. He alleged, inter alia, that he was denied due process by the failure of the trial court to determine his competency prior to trial, that the discretion of the jury that sentenced him to death was not properly guided by the trial court, and that he was sentenced to death under a vague and overbroad construction of the aggravating circumstance set out in Ga. Code Ann. § 27-2534.1 (b)(7), which provides for the death penalty where the offense of murder "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim."

The Superior Court of Butts County denied the application for a writ of habeas corpus, App. at 1a, and the Supreme Court of Georgia declined to review the decision. App. at 22a.

The petitioner, a 19-year-old black male with a ninth grade education, was convicted of murder on October 24, 1979, following a jury trial. That same day, the jury recommended that petitioner be sentenced to death. On October 25, 1979, the trial court issued an Order of Execution. R. 119. 1/

From the outset, there was a question as to the competency of the petitioner to stand trial. Within three weeks of petitioner's indictment, the trial court ordered him examined by the psychiatric staff at Grady Memorial Hospital "for the purpose of determining whether or not he is capable of standing

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1/ "Tr." refers to the transcript of petitioner's trial in the Fulton Superior Court. "R." refers to the record on appeal in the direct appeal of his conviction to the Georgia Supreme Court. Both were made a part of the record in the court below. "HC" refers to the transcript of the hearing on the petition for a writ of habeas corpus before the Butts County Superior Court on February 11, 1982.

trial and participating in his own defense, and, whether or not Defendant was mentally competent at the time of the alleged offense or offenses." R. 5.

Donald Thomas was examined by three psychiatrists prior to trial.[2/] One found that he "had no idea of the month or day," his speech was "characterized by tangential to loose associations," his affect was "markedly flattened" and his mood "depressed." The doctor reported that during the examination the petitioner "became increasingly restless and agitated, eventually ceasing to respond to questions while rocking back and forth in the chair and rubbing his genitals with his hands." He found symptoms "clearly indicative of a diagnosis of schizophrenia" and concluded that petitioner was "so substantially impaired as a result of psychiatric symptions as to be unable to assist his attorney in the preparation and implementation of his defense." App. at 23a-24a.

The second psychiatrist who examined petitioner was unable to make a definite diagnosis or state an opinion as to his competency to stand trial. App. at 25a-26a. A third report, received from Central State Hospital, indicated that petitioner was "partially oriented," of "borderline" intelligence, and suffering from a "thought disorder, which resembles that of a schizophrenic process," but contained the opinion that he was competent to stand trial. App. at 27a-28a.

Petitioner's court-appointed lawyer testified at the habeas corpus proceeding that he had experienced difficulty communicating with his client. HC at 56. Counsel also testified that petitioner sat throughout trial with his

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2/ Three reports were received by the trial court regarding competency and made a part of the record. The reports are included in the appendix to this petition at 23a-28a.

right armed raised and his fist clenched and that he was unable to persuade his client to refrain from this inappropriate behavior. HC at 60-61.

Despite the conflicting opinions as to the petitioner's competency and the inappropriate behavior of the petitioner at trial, no evidentiary hearing on competency was ever held. Nor were there any judicial findings as to the competency of petitioner to stand trial.

Petitioner was convicted of the murder of a 9-year-old child, whose body was found on some railroad tracks near where petitioner lived. The State linked petitioner to the killing through the testimony of two witnesses, petitioner's fifteen-year-old retarded girlfriend and his alcoholic stepfather, both of whom testified that petitioner had admitted the killing to them. Tr. 352, 390. The stepfather recanted his testimony at the hearing on the petition for a writ of habeas corpus, and said that he testified falsely at trial because he had been jailed right before trial, was suffering from withdrawal from alcohol, and was afraid. HC at 219-226.

The State served notice of its intention to seek the death penalty on the first day of trial, indicating that it would attempt to prove that petitioner committed the offense under aggravating circumstances set out in Ga. Code Ann. Section 27-2534.1 (b)(7): "The offense of murder was outrageously and wantonly vile, horrible and inhuman, in that it involved torture and depravity of mind."

The only evidence introduced at the sentencing hearing was petitioner's prior convictions for child molestation and aggravated assault with intent to rape offered by the State. Tr. 557-58. In instructing the jury on the aggravating circumstance, the court stated:

> In this case the state contends that the offense of murder for which the accused has been convicted was outrageously and wantonly vile, horrible and inhuman, in that it involved torture and depravity of mind.
>
> Such a circumstance is defined as a statutory aggravated circumstance under the law of this state.

Tr. at 565-566. The jury was not instructed as to what evidence it could properly consider in determining whether the statutory aggravating circumstance had been proven. And it was not given any limiting instruction with regard to its consideration of petitioner's prior convictions.

The jury recommended that Mr. Thomas be sentenced to death and the trial court sentenced him to death in the electric chair. 3/

HOW THE FEDERAL QUESTIONS WERE PRESENTED AND DECIDED BELOW

Petitioner alleged in paragraphs 9-15 of his petition for a writ of habeas corpus that the failure of the trial court to resolve conflicting psychiatric opinion regarding petitioner's competency offended petitioner's right to due process of law guaranteed by the Fourteenth Amendment to the Constitution. Petitioner submitted a written memorandum of law in support of this contention prior to the hearing on his petition. The Superior Court of Butts County held that the trial of the petitioner

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3/ The Georgia Supreme Court affirmed petitioner's conviction. Thomas v. State, 245 Ga. 668, 266 S.E.2d 499 (1980). This Court vacated the judgment of the Georgia Supreme Court and remanded the case for further consideration in light of Godfrey v. Georgia, 446 U.S. 420 (1980). Thomas v. Georgia, 449 U.S. 988 (1980). On remand, the Georgia Supreme Court reinstated the death sentence. Thomas v. State, 247 Ga. 234, 275 S.E.2d 318 (1981), cert. denied, ___ U.S. ___, 69 L.Ed.2d 984 (1981).

without an evidentiary hearing to determine competency did not violate the due process clause as interpreted by this Court in Pate v. Robinson, 383 U.S. 375 (1966). Op. at 7-9, App. at 7a-9a. The Court concluded that the conflicting reports did not create a "bona fide doubt as to his competency." Although there was testimony by petitioner's trial counsel that petitioner sat with his arm raised and his fist clenched throughout the trial, the court concluded that Petitioner "presented no evidence to indicate his demeanor at trial created any suspicion of mental illness." App. at 9a.

In paragraphs 39-45 of his petition, petitioner asserted that instruction of the jury in the bare words of the statute authorizing death if the murder was "outrageously and wantonly vile, horrible and inhuman in that it involved torture and depravity of mind" did not provide sufficient guidance for consideration of the death penalty and therfore offended the Eighth and Fourteenth Amendments to the Constitution.[4/] The Superior

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4/ Before trial petitioner challenged the validity and application of the aggravating circumstance because it allowed the jury subjective discretion in considering the death penalty in violation of Furman v. Georgia, 408 U.S. 238 (1972), and the Eighth and Fourteenth Amendments to the Constitution. He also contended that the absence of an objective standard for finding aggravating circumstances eliminated the ability of the Georgia Supreme Court to review effectively his death sentence as required by Ga. Code Ann. §27-2537 and the due process clause of the Fourteenth Amendment. Prior to the penalty phase, petitioner again stated his objection to the lack of an objective standard for finding aggravating circumstances which would permit the imposition of the death penalty:

> I would further reraise my objection to the notice of statutory aggravating circumstances served upon me, and that is 27-2534.1 parenthesis 7, on the grounds that it's vague and has no objective standard to be applied in deciding whether that statutory aggravating circumstance exists.

Tr. at 550.

Court of Butts County rejected this contention, finding that the Georgia Supreme Court had upheld the aggravating circumstance on remand, Thomas v. State, 247 Ga. 234, 275 S.E.2d 318 (1981), and that "[i]mplicit in this finding is the conclusion that the jury charge sufficiently channeled the jury's discretion . . . ." App. at 20a.

In paragraphs 46-49 of the petition it was asserted that the terms "torture" and "depravity of mind" were applied in a vague and overbroad manner in violation of the Eighth and Fourteenth Amendments to the Constitution. The Superior Court of Butts County rejected that assertion on the basis of the Georgia Supreme Court's opinion on remand in petitioner's direct appeal:

> Contrary to Petitioner's assertion, the [Georgia] Supreme Court has already concluded the (b)(7) aggravating circumstance was properly applied. Thomas v. State, Addendum, 247, Ga. at 234.

App. at 21a. On remand from this Court, the Georgia Supreme Court, in reinstating petitioner's death sentence, had concluded that because of evidence that petitioner had admitted beating the decedent with a stick and choking him, the jury could find serious physical abuse, and because of petitioner's prior convictions for child molestation and assault with intent to rape, it could infer that the decedent had been sexually abused. Thomas v. State, supra, 275 S.E.2d at 319.

REASONS FOR GRANTING THE WRIT

For the reasons which follow, this Court should issue a writ of certiorari to review the decision of the Georgia Supreme Court.

I. THE FAILURE OF THE GEORGIA SUPREME COURT TO FIND THAT AN EVIDENTIARY HEARING WAS REQUIRED WHERE THERE WAS SUBSTANTIAL EVIDENCE OF THE PETITIONER'S INCOMPETENCY CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT, OTHER STATE COURTS OF LAST RESORT AND FEDERAL COURTS OF APPEAL.

Despite information before the trial court which raised a substantial question as to petitioner's competency to stand trial, that court failed to conduct an evidentiary hearing and make a determination of petitioner's competency to understand the proceedings against him and properly assist in his own defense.

The trial court received three psychiatric reports before trial which were evenly divided in the opinions they contained as to petitioner's competency. The reports indicated that petitioner suffered from schizophrenia, had difficulty communicating, was at best only "partially oriented," and was of "borderline" intelligence.5/ At trial, the court heard evidence of bizzare and irrational behavior on the part of the petitioner in locking his girlfriend in a room for a week, showing her the body of the decedent and then jumping on the body.6/ At the habeas corpus hearing there was evidence that counsel had difficulty communicating with his client and that petitioner exhibited inappropriate behavior at trial.7/

The conclusion of the Court below that a competency hearing was not required by this evidence constitutes a marked departure from

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5/ The three reports appear in the appendix to this brief at 23a-28a.

6/ Tr. at 352, 375-377.

7/ HC at 56, 60-61.

the holdings of this Court, state courts of last resort, and federal courts of appeal. Therefore, this Court should issue a writ of certiorari to review the decision of the court below.

This Court has made it clear that "failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial." Drope v. Missouri, 420 U.S. 162, 172 (1975), citing Pate v. Robinson, 383 U.S. 375, 378 (1966). See also Bishop v. United States, 350 U.S. 961 (1956) reversing 96 U.S. App. D.C. 117, 120, 223 F.2d 582, 585 (1955). In both Drope and Robinson this Court, although finding that state statutory schemes "jealously guarded" this right,8/ reversed convictions because of the failure of trial courts to utilize adequate procedures once a question as to the competency of the defendant was raised. The Court pointed to three factors -- evidence of a defendant's irrational behavior, any medical opinions on competence, and a defendant's demeanor at trial -- as being relevant to determining whether further inquiry is required and stated that "even one of these factors standing alone may, in some circumstances, be sufficient." Drope, supra at 180.9/

8/ Robinson, supra at 385, Drope, supra at 173.

9/ In Robinson, this Court found that a history of irrational behavior was sufficient to warrant an evidentiary hearing despite the stipulated opinion of a psychiatrist that the defendant knew the nature of the charges and could cooperate with his attorney and the fact that he appeared mentally alert during trial. 383 U.S. at 385-86. In Drope, this Court held that irrational behavior by the defendant prior to trial, a suicide attempt during trial and the suggestion of a psychiatrist and the defendant's lawyer that he needed psychiatric treatment created a sufficient doubt of his competency to stand trial to require further inquiry by the trial court. 420 U.S. at 180.

Where there is conflicting documentary evidence on the question of competency, an evidentiary hearing is required. In Bishop v. United States, supra, this Court reviewed a decision by the Court of Appeals for the District of Columbia Circuit sustaining a determination of a competency question without a hearing on the information before the trial court, including a detailed report of a psychiatrist. See 96 U.S. App. D.C. at 120-121, 223 F.2d at 585-86. In a per curiam decision, this Court vacated the judgment and remanded the case for a hearing on competency. 350 U.S. at 961. In addition, an evidentiary hearing is also necessary, as the Court of Appeals of Oregon has pointed out, to protect other fundamental rights of the accused, such as the rights of cross-examination and confrontation. Brady v. Calloway, 11 Or. App. 30, 36, 501 P.2d 72, 75 (1972).10/

Accordingly, state and federal courts have held that an evidentiary hearing is constitutionally required when the information before the trial court is sufficient to raise doubt as to the competency of the defendant to stand trial. Osborne v. Thompson, 610 F.2d 461, 462 (6th Cir. 1979); Fitch v. Estelle, 587 F.2d 773, 777 (5th Cir.), cert. denied, ___ U.S. ___, 100 S.Ct. 170 (1979); Moore v. United States, 464 F.2d 663, 666 (9th Cir. 1972); Rhay v. White, 385 F.2d 883 (9th Cir. 1967); Commonwealth v. Hill. 375 N.E.2d 1168 (Mass. 1978); State v. Spivey, 65 N.J. 21, 37, 319 A.2d 461, 469 (1974); People v. Pennington, 66 Cal.2d 508, 518-19, 58 Cal. Rptr. 374, 381, 426 P.2d 942, 949 (1967); State v. Jensen,

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10/ It is well established that a trial court cannot delegate its responsibility to the state hospital to determine the competency of a defendant. "Like criminal responsibility, incompetency is a legal question; the ultimate responsibility for its determination must rest in a judicial rather than a medical authority. . . . " Note, Incompetency to Stand Trial. 81 Harv.L.Rev. 454, 470 (1976). The commentator also points out that "there is repeated evidence that psychiatrists often misunderstand the test of incompetency . . . . Medical opinion about the defendant's condition should be only one of the factors relevant to a determination." Id. [footnotes omitted.]

278 Minn. 212, 153 N.W.2d 339 (1967). Other courts have protected the right to a determination of competency by rigorously enforcing state statutes requiring evidentiary hearings without reaching the constitutional question. See, e.g., People v. Livingston, 57 Mich. App. 726, ___, 226 N.W.2d 704, 709 (1975), where the court reiterated that "the trial judge must announce, on the record, the commencement of a formal evidentiary hearing into the question of competency" regardless of whether a hearing is requested.11/

Thus, once the evidence before the trial court is sufficient to raise a reasonable doubt as to competency, the trial court must conduct an evidentiary hearing to resolve the issue.

> [A] due process evidentiary hearing is constitutionally compelled at any time that there is "substantial evidence" that the defendant may be mentally incompetent to stand trial. . . . Evidence is "substantial" if it raises a reasonable doubt about the defendant's competency to stand trial. Once there is such evidence from any source, there is a doubt that cannot be dispelled by resort to conflicting evidence. The function of the trial court . . . is not to determine the ultimate issue: Is the defendant competent to stand trial? It [sic] sole function is to decide whether there is any evidence which, assuming its truth, raises a reasonable doubt about the defendant's competency. At any time that such evidence appears, the trial court sua sponte must order an evidentiary hearing on the competency issue. . . .

Moore v. United States, supra at 666. In People v. Pennington, supra, the California Supreme Court held in light of Pate v. Robinson, supra, that its previous interpretation of that state's penal code, which permitted a trial court to resolve conflicting evidence to decide if there was a doubt as to the competency of a defendant, was unconstitutional as applied to a defendant who

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11/ But see also State v. Jemison, 14 Ohio St.2d 47, 236 N.E.2d 538, 540 cert. denied, 393 U.S. 943 (1968), where in interpreting an Ohio statute the court approved of referral to the state hospital to determine the issue of competency without an evidentiary hearing.

presented substantial evidence of incompetence. People v. Pennington, supra, 66 Cal.2d at 516-17, 58 Cal. Rptr. at 380, 426 P.2d at 948-49, revising its decision in People v. Merkouris, 52 Cal.2d 672, 344 P.2d 1, cert. denied, 361 U.S. 943 (1960).

The failure of the Georgia courts to require a competency hearing in this case is in conflict with these decisions.12/ There was not only sufficient evidence to create a reasonable doubt as to the petitioner's competency, there was an even division in the opinions of the experts as to petitioner's competency. The opinion of one psychiatrist that petitioner was unable to assist his attorney provided a stronger indication of incompetency than was before the trial courts in either Robinson or Drope.13/ But of course it did not stand alone. One doctor was unable to reach a conclusion as to diagnosis and competency, the report from the state hospital raised serious questions about the mental health of petitioner, there was evidence at trial of irrational and bizzare behavior on the part of the petitioner, and there was unusual

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12/ Although Georgia Code Section 27-1502(a) provides for a trial on the issue of competency before a "special jury," no such trial was conducted by the trial court below. This was apparently because the prosecution did not object to transfer of the petitioner to the Department of Human Resources, thereby obviating the need for a finding of incompetency by a special jury to accomplish the transfer as provided in Section 27-1502(a). Subsections (b) and (e) of the statute provide for the return of a person transferred to the Department to the court upon a determination of competency by the Department. Subsection (f) of the statute provides that after return to the court, a person is entitled to again file a special plea of incompetency under the statute. The statute is set out on pages 2-3 of this petition.

13/ In neither Robinson nor Drope did the trial court have before it an expert opinion of incompetency. While in those cases there appeared to be sufficient indicia of mental instability to require further inquiry, here the evenly divided opinions of the psychiatrists who examined petitioner squarely presented an issue for resolution to the trial court.

behavior on the part of petitioner at trial.14/

Therefore petitioner respectfully submits that the Georgia courts have failed to protect his right not to be tried or convicted while incompetent in violation of the due process guarantee of the Fourteenth Amendment. Because of the importance of the departure by the Georgia courts from the authorities cited herein in the context of this death penalty case, this Court should issue a writ of certiorari to review the decision of the Georgia Supreme Court.

14/ Indeed, the fact that the trial court entered an order stating that "the defendant may be presently incompetert to participate in his defense" and its transfer of petitioner to the state hospital indicates that the court recognized the substantial evidence of incompetency, and, therefore, it was required to conduct an evidentiary hearing. See, Tillery v. Eyman, 492 F.2d 1056, 1059-60 (9th Cir. 1974) (Sweigert, J. concurring).

II. THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH THE DECISIONS OF THIS COURT REQUIRING THAT CONSIDERATION OF THE DEATH PENALTY BE GUIDED BY CLEAR AND OBJECTIVE STANDARDS.

Petitioner's jury was instructed that it could impose the death penalty pursuant to Ga. Code Ann. Section 27-2534.1(b)(7) if it found that the offense of murder was "outrageously and wantonly vile, horrible or inhuman in that it involved torture and depravity of mind." Tr. at 565-566, App. at 29a-30a. The jury was provided with no definition of "torture" or any other terms of (b)(7) in the trial court's instructions. Nor was it instructed as to the limited purposes for which petitioner's prior convictions for child molestation and assault with intent to rape were admitted, assuming that those convictions were properly admitted at the sentencing hearing.15/

The jury in returning its sentence of death made no specific findings of fact, but merely parroted the language of the statute which had been quoted to them by the trial court. Thus, as in Godfrey v. Georgia, 446 U.S. 420 (1980), the trial judge's sentencing instructions "gave the jury no guidance concerning the meaning of any of Section (b)(7)'s terms. In fact, the jury's interpretation of Section (b)(7) can only be the subject of sheer speculation." Id., at 429 (opinion of Stewart, Blackmun, Powell and Stevens, JJ.).

15/ Prior convictions provide no basis for imposing the death penalty pursuant to section (b)(7). Although such convictions might be properly admitted in rebuttal of evidence of mitigation or to impeach the credibility of the defendant if he testified, no evidence of mitigation was offered on behalf of petitioner and he did not testify. Thus, it appears that the prior convictions were not properly admitted at petitioner's sentencing hearing. But see Gates v. State, 244 Ga. 587, 261 S.E.2d 349 (1979).

Although this Court vacated petitioner's death sentence and remanded his case for further consideration in light of Godfrey,16/ the Georgia Supreme Court on remand reimposed the death penalty. It held that subsection (b)(7) was properly applied to the facts of the case. Thomas v. State, supra, 275 S.E.2d at 319. Petitioner moved the Georgia Supreme Court for the opportunity to brief the issue of whether he was entitled to a new sentencing hearing because the discretion of the jury that sentenced him to die was not properly guided. However, the Court did not permit briefing and did not address that issue in its opinion. The Superior Court of Butts County in considering this claim below rejected it based upon the decision of the Georgia Supreme Court on remand. App. at 20a.

Thus, this case presents an important constitutional issue left unanswered by Godfrey: whether instructing the jury in the bare words of such a vague statute provides sufficient guidance as required by the Eighth and Fourteenth Amendments in considering the penalty of death.

Mr. Justice Marshall addressed the issue in his concurrence in Godfrey, expressing the view that only a properly instructed jury may impose the sentence of death:17/

> The jury must be instructed on the proper, narrow construction of the statute. The Court's cases make clear that it is the sentencer's discretion that must be channeled and guided by clear, objective, and specific standards. . . . To give the jury an instruction in the form of the bare words of the statute -- words that are hopelessly ambiguous and could be understood to apply to any murder . . . -- would effectively grant it unbridled discretion to impose the death penalty.

446 U.S. at 437 (Marshall, J., concurring). See also Davis v.

16/ Thomas v. Georgia, 449 U.S. 988 (1980).

17/ Under Ga. Code Ann. Sections 26-3102, 27-2503(b) the sentencing authority in death cases is the jury.

Georgia, 451 U.S. 921 (1981) (Marshall, J., dissenting from denial of certiorari); Hill v. Georgia, 451 U.S. 923 (1981) (Marshall, J., dissenting from denial of certiorari); Willis v. Balkcom, 451 U.S. 926 (1981) (Marshall, J., dissenting from denial of certiorari). The exercise of such unbridled discretion cannot be salvaged by appellate review. Here, as in Godfrey, "the standardless and unchanneled imposition of the death sentences in the uncontrolled discretion of a basically uninstructed jury . . . was in no way cured by the affirmance of those sentences by the Georgia Supreme Court." 446 U.S. at 429 (opinion of Stewart, Blackmun, Powell and Stevens, JJ.). As Mr. Justice Marshall stated:

> Such a defect could not be cured by the post hoc narrowing construction of an appellate court. The reviewing court can determine only whether a rational jury might have imposed the death penalty if it had been properly instructed; it is impossible for it to say whether a particular jury would have so exercised its discretion if it had known the law.

446 U.S. at 437 (Marshall, J., concurring).

The Georgia Supreme Court's speculation as to what the jury did find, what it could have found and what it was authorized to find based upon its review of a cold record is, therefore, inconsistent with this Court's opinions in Godfrey, Gregg v. Georgia, 428 U.S. 153 (1976) and Furman v. Georgia, 408 U.S. 238 (1972). See also Presnell v. Georgia, 439 U.S. 14 (1979); Shuttlesworth v. City of Birmingham, 382 U.S. 87, 91-92 (1965). Because of the importance of this issue in the review of death penalty cases, this Court should grant certiorari to review the decision of the Georgia Supreme Court.

III. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE GEORGIA SUPREME COURT EMPLOYED SUCH A BROAD AND VAGUE CONSTRUCTION OF THE WORDS "TORTURE" AND "DEPRAVITY OF MIND" IN UPHOLDING PETITIONER'S DEATH SENTENCE AS TO VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

Petitioner's sentence of death rests upon a finding that the offense of murder "was outrageously or wantonly vile, horrible or inhuman in that it involved torture or depravity of mind." This aggravating circumstance is set out in Georgia Code Ann. Section 27-2534.1(b)(7).18/ In Gregg v. Georgia, supra, this Court held that the statutory aggravating circumstance contained in section (b)(7) was not unconstitutional on its face, but warned that it should not be given "an open-ended construction." Id. at 201 (opinion of Stewart, Powell and Stevens, JJ.). In Godfrey v. Georgia, supra, this Court reversed a decision of the Georgia Supreme Court where it had failed to apply in that case a narrow construction of section (b)(7) necessary to avoid the arbitrary and capricious infliction of the death sentence.

Despite the teaching of Gregg, Godfrey and Furman v. Georgia, supra, the Georgia Supreme Court upon remand of this case for further consideration in light of Godfrey, defined and construed the terms of (b)(7) in such a way as to apply those terms to any assault of lethal magnitude. The question of whether the Georgia courts are properly following Godfrey presents an important consitutional issue which should be settled by this Court. Therefore, a writ of certiorari should issue to review the decision below.

18/ Ga. Code Ann. Section 27-2534.1(b)(7) provides that the death penalty may be imposed if "The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim." Petitioner's jury was not instructed with regard to aggravated battery.

In reaffirming the death penalty, the Georgia Supreme Court held that the jury was authorized to find torture because of serious physical and sexual abuse of the victim. It based its finding of serious physical abuse upon the fact that petitioner admitted that he killed the decedent by "beating him with a stick and choking him to death." 275 S.E.2d at 319. The only evidence as to the circumstances of death were provided by petitioner's fifteen-year-old girlfriend, who related the admission in her testimony, and the medical examiner. The medical examiner found antemortem bruises to the neck caused by strangulation which was the cause of death. Tr. 434, 435, 441. He also found two lacerations on the top of the head and minor bruises and abrasions on the arms and chest of the decedent. Tr. at 433. There was no testimony as to whether these injuries were sustained before or after death, although it appears from the testimony that some were postmortem. Tr. at 441. Thus, there was no evidence to suggest that the decedent was subject to prolonged physical abuse or pain prior to death which would authorize a finding beyond a reasonable doubt of torture.19/

The Georgia Supreme Court based its finding of serious sexual abuse upon the petitioner's prior convictions for sex offenses and the fact that the pants of the decedent were partially removed when the body was discovered. This finding of sexual abuse was not made by the trial judge in his report to the Georgia Supreme Court20/ and was only suggested as a possible motive by the prosecutor at

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19/ As this Court observed in Godfrey, supra, the Georgia court has held that "'Torture' must be construed in pari materia with 'aggravated battery' so as to require evidence of serious physical abuse of the victim before death." Id. at 431 [emphasis added]. See also Hance v. State, 245 Ga. 856, 268 S.E.2d 339 (1980) cert. denied, ___ U.S. ___, 66 L.Ed.2d 611 (1981). In his report to the Georgia Supreme Court, the trial judge expressed his view that the death penalty was appropriate because of "Unexplained strangulation of a 9-year old child; brutality of child's corpse." Report of Trial Judge at 6. Supplemental R. 6. [Emphasis added].

20/ The trial judge reported to the Georgia Supreme Court that the murder was "unexplained." Report of Trial Judge at 6, Supplemental R. 6.

trial.21/ There was no forensic evidence of sexual abuse of the decedent. The petitioner's girlfriend, who testified that petitioner showed her the corpse, did not testify that the pants were partially removed when she saw the body. Finally it should be noted that petitioner's prior convictions provide no basis for either the jury or the Georgia Supreme Court to infer that the crime was committed in a certain manner.22/ The fact the Georgia Supreme Court found this to be a basis upon which the jury could have found sexual abuse beyond a reasonable doubt aptly demonstrates the failure of that court to employ a proper, narrow construction of the terms of section (b)(7).

Thus, the Georgia Supreme Court, in reviewing the sentence of death in petitioner's case on direct appeal, applied a construction of the term "torture" which is so overly broad as to encompass any assault of lethal magnitude. As Mr. Justice Marshall pointed out in his concurrence in Godfrey:

> The Georgia court has given an extraordinarily broad meaning to the word "torture." Under that court's view, "torture" may be present whenever the victim suffered pain or anticipated the prospect of death. . . . That interpretation would of course enable a jury to find a Section (b)(7) aggravating circumstance in most murder cases.

Godfrey v. Georgia, supra at 441 n. 12 (Marshall, J., concurring). In petitioner's case and other cases considered in light of Godfrey, the Georgia Supreme Court has continued to apply such an

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21/ In her closing argument the prosecutor, after observing that she was not required to prove any motive but suggesting that the motive may have been sexual molestation, stated: "You can accept it or reject it. It may even have been a thrill killing. . . . He may have killed for the way he looked." Tr. at 510-511.

22/ The principle that "'the doing of one act is in itself no evidence that the same or a like act was again done by the same person' has been so often judicially repeated that it is commonplace." 1 Wigmore, Evidence Section 192 at 642 (3d ed. 1940) [citations omitted]; McCormick, Evidence Section 157 (2d ed. 1972); 1 Underhill, Criminal Evidence Sections 205-12 (5th ed. 1956); Drew v. United States, 118 U.S. App. D.C. 11, 331 F.2d 85 (1964).

extraordinarily broad meaning to the word "torture" in upholding death sentences under section (b)(7). See, e.g., Mulligan v. State, 245 Ga. 881, 268 S.E.2d 351 (1980), cert. denied, 449 U.S. 986 (1980) (where decedent shot four times and first shot was not fatal, jury was authorized to find serious physical abuse constituting torture prior to death); Brooks v. State, 246 Ga. 262, 271 S.E.2d 172, 173 (1980), cert. denied, 451 U.S. 921 (1981) (where decedent shot once in neck and died within two hours, jury authorized to find torture because death not instantaneous); Baker v. State, ___ Ga. ___, 272 S.E.2d 61, 62 (1980), cert. denied, 450 U.S. 936 (1981) (where victim struck with a whiskey bottle and shot three times in the chest, jury authorized to find torture).23/

The Georgia Supreme Court's treatment of the (b)(7) issue here provides "no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." Godfrey v. Georgia, supra at 433 (opinion of Stewart, Blackmun, Powell and Stevens, JJ.). Because the Georgia court's construction of (b)(7) raises an important constitutional issue which should be settled by this Court, a writ of certiorari should issue to review that court's decision.

23/ Thus, the Georgia Supreme Court has failed to limit (b)(7) to cases such as McCorquodale v. State, 233 Ga. 369, 211 S.E.2d 577 (1974) and House v. State, 232 Ga. 140, 205 S.E.2d 217 (1974), as anticipated by the prevailing opinions in Gregg and Godfrey. Gregg, supra at 201 (opinion of Stewart, Powell and Stevens, JJ.); Godfrey, supra at 429-30 (opinion of Stewart, Blackmun, Powell and Stevens, JJ.). (In McCorquodale, the victim suffered prolonged torture in which she was beaten, burned, bitten, cut with a razor and scissors, sodomized, raped, and subjected to salt being placed in her wounds and hot wax dripped over her body before she was strangled and killed. In House, two seven year old boys were choked to death after each had been forced to submit to anal sodomy.) The Georgia court's cursory treatment of (b)(7) in petitioner's case and other cases indicates that it has not properly limited (b)(7) to a few cases like McCorquodale and House.

CONCLUSION

For the reasons stated herein, Donald Wayne Thomas asks that a writ of certiorari issue to review the decision of the court below.

Respectfully submitted,

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IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

DONALD WAYNE THOMAS,	:	
	:	
PETITIONER	:	
	:	HABEAS CORPUS
VS.	:	FILE NO. 5293
	:	
WALTER D. ZANT, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER,	:	
	:	
RESPONDENT	:	

ORDER

This habeas corpus challenges the constitutionality of Petitioner's restraint and the imposition of the death penalty by the Superior Court of Fulton County. Petitioner was convicted of murder and received a death sentence. The Supreme Court affirmed the conviction and sentence. Thomas v. State, 245 Ga. 688 (1980). The Supreme Court of the United States vacated the death sentence and remanded the case for further consideration in light of Godfrey v. Georgia, 446 Ga. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). Upon reconsideration the Supreme Court reaffirmed the death sentence. Thomas v. State, Addendum, 247 Ga. 233 (1981). Certiorari was denied by the Supreme Court of the United States.

The petition, as amended, contains 67 paragraphs, of which 60 allege substantive claims for relief (7-63, 65-67). The Court will address these claims for relief

by paragraphs corresponding numerically to the paragraphs in the amended petition.

The record in this case consists of the transcript of proceedings before this Court on February 11, 1982; the affidavits of Ellen Parks, Jerlene Parks, Larry Joe Swaney, August F. Siemon, and Marjorie Fargo; and the transcript and record of Petitioner's trial in the Fulton Superior Court.

7-9

In paragraphs 7-9, Petitioner claims he was denied his right to effective assistance of counsel in violation of his Sixth, Eighth, and Fourteenth Amendment rights and rights under the Georgia Constitution.

FINDINGS OF FACT

Petitioner was represented by Robert Coker at trial and by Jack Dorsey on appeal.

Mr. Coker was admitted to the Bar in November, 1973. Since May, 1974, he has been with the Fulton Public Defender's Office, handling criminal cases exclusively. Counsel estimated that he has conducted 15-20 jury trials per year. He has also tried 10-15 murder cases. He has also handled 3 death cases, 2 of which, including Petitioner's, he has tried.

After Counsel was appointed, he visited Petitioner at least 10 times, each visit lasting a minimum of 45

minutes or more. He interviewed witnesses, talked to the District Attorney's Office and the Atlanta Homicide Office and saw the latter's file. Petitioner denied any guilt. He gave Counsel an alibi that did not pan out, told him that Linda Cook was lying and that Enzor Lowe was a drunk.

Counsel requested that Petitioner be given a psychiatric examination, and the request was granted. (R. 5). Dr. Lloyd T. Baccus of Grady Memorial Hospital examined Petitioner, found that he was incompetent to stand trial, and recommended he be transferred to an inpatient facility. (R. 6-7). Counsel filed a special plea of insanity. (R. 8). The trial court ordered a second evaluation of Petitioner. Dr. Sheldon B. Cohen was unable to arrive at a diagnosis or determine Petitioner's competency, noting there was conflicting information from the first evaluation at Grady and the one he conducted, and recommended extensive observation at Central State Hospital. (R. 14-15). Pursuant to court order, Petitioner was transferred to the custody of the Department of Human Resources. (R. 13). At Central State Hospital, Petitioner was found competent to stand trail. (R. 16-17). Counsel subsequently visited with Dr. Baccus on the Friday before Petitioner's trial, and Dr. Baccus told him

that he had no insanity defense. Counsel abandoned the special plea because he thought it would be futile to pursue it.

Prior to trial, Counsel filed numerous motions. (R. 8, 18, 22, 29, 32, 33, 35, 36, 38, 39, 49, 55, 56, 68, 71, 73) and requests to charge (R. 96, 115). He testified that the idea to seek a mental competency for either Linda Cook or Enzor Lowe, the chief State's witnesses, never occurred to him. He thought Ms. Cook was a very impeachable witness and Mr. Cook a very weak witness, so he saw no reason for a competency exam.

During the voir dire examination, Counsel testified that he asked the usual questions. His strategy was to try to get an all-black jury if possible. He considered the issue of race in evaluating jurors but did not question jurors on this issue. His usual practice is to refrain from asking such questions to prevent adverse reactions.

At trial, Counsel made an opening statement (T. 344-345); cross-examined witnesses (T. 348; 358; 381; 390; 406; 419; 446; 451; 454; 461; 467; 473); made motions (T. 474; 475; 484; 485; 576); gave closing arguments in the guilt/innocence (T. 514-538) and sentencing (T. 560-565) phases.

Counsel testified that he did not present evidence in mitigation because Petitioner refused to testify and said that he did not want anybody to cry for him. Petitioner's mother left the courtroom

after the verdict and later could not be found. Counsel did not remember why he did not call any psychiatrists, but he thought that he did not call them because the State could have cross-examined them and rebutted their testimony.

CONCLUSIONS OF LAW

The Sixth Amendment right to counsel means "...not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960); Pitts v. Glass, 231 Ga. 638 (1974).

Counsel here easily meets the test. Mr. Coker was experienced in the trial of criminal cases. He prepared for and advocated Petitioner's cause in a reasonably effective manner considering the difficulty of the case and lack of material with which to work. The effort he put forth was certainly reasonably effective within the meaning of the standard.

Petitioner has claimed Counsel was ineffective for not pursuing Petitioner's special plea of insanity. Counsel testified that he abandoned the plea because he thought it would be futile to pursue it since he had no evidence to present. Petitioner has not shown the special plea could have been successful. The Court does not view Counsel's decision as amounting to ineffective assistance.

Petitioner has also claimed Counsel was ineffective for failing to present an insanity defense. Yet, Petitioner has made no showing that Petitioner acted under a delusional compulsion or could not distinguish between right and wrong at the time of the offense. Smith v. State, 245 Ga. 44(1)(1980). Even Petitioner's own witnesses described him as a normal person in the proceedings before this Court. The Court cannot conclude Counsel was ineffective for this reason.

Petitioner has also asserted Counsel was ineffective in the sentencing phase for not presenting evidence as to Petitioner's mental condition. Counsel did not remember why he did not call any psychiatrists, but thought that he did not because the State could cross-examine and rebut their testimony. This tactical decision is within the exclusive province of a lawyer after consulation with his client. Reid v. State, 235 Ga. 378 (1975). Petitioner's own witnesses testified at the habeas hearing that he was a "normal person" and were unaware of any mental problems. Thus, Petitioner has made no showing that such evidence was available. The Court cannot conclude Counsel was ineffective.

Petitioner has also complained of Counsel's failure to request an instruction after the jury asked how soon a person could be released if given a life sentence. (T. 596). The trial court's refusal to comment on the question maintained the neutrality

required by Ga. Code Ann. §27-2206 and, therefore, was proper. Thomas v. State, 240 Ga. 393(6)(1977); Willis v. State, 243 Ga. 185(6)(1979); Tucker v. State, 244 Ga. 721 (1979). The Court does not find Counsel ineffective for not requesting an instruction on something that was not error.

Petitioner's remaining allegations as to what opening argument Counsel should have made, what questions to have asked on voir dire, whether to have requested competency exams for two witnesses, or what issues retained counsel, Jack Dorsey, should have raised on appeal are strategic and tactical decisions which are the lawyer's to make after consultation with his client. Reid v. State, supra. Effectiveness is not measured by how another lawyer might have handled the case. Estes v. Perkins, 225 Ga. 268 (1968).

Accordingly, this claim for relief is found to be without merit.

9-15

In paragraphs 9-15, Petitioner alleges that the failure of the trial court to conduct a hearing on his special plea of insanity deprived him of his right to due process under the Fourteenth Amendment and Georgia Constitution.

FINDINGS OF FACT

The Supreme Court has already concluded that Petitioner was not put to trial while under an alleged

outstanding order of incompetency. Thomas v. State, 245 Ga. at 692. In so deciding, the Court found as fact that in response to a special plea of insanity, Petitioner was examined by two psychiatrists, who tendered conflicting reports. Id. The trial court ordered that Petitioner be transferred to the custody of the Department of Human Resources in order to be examined by the staff at Central State Hospital. Id. The doctors at Central State found Petitioner competent to stand trial. Id.

Trial counsel testified that on the Friday before trial began, he talked with the first psychiatrist who had examined Petitioner and who had found him incompetent to stand trial. The doctor told Counsel he had no insanity defense. Counsel abandoned the special plea because he thought it would be futile to pursue it.

CONCLUSIONS OF LAW

In Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966), the Court held if a defendant has presented evidence to the trial court, before or during trial, that raises a bona fide doubt of his competence to stand trial, that court's failure to make further inquiry into the matter denies the defendant his right to a fair trial. In determining whether a competency hearing is required, three factors should be considered;

the existence of a history of irrational behavior, defendant's demeanor at trial, and prior medical opinion. Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 986, 43 L.Ed.2d 103 (1975).

Petitioner has established no history of irrational behavior. Even his witnesses testified before this Court that he had always been a normal person. In addition, he has presented no evidence to indicate his demeanor at trial created any suspicion of mental incompetence. Finally, despite previously conflicting reports, the doctors who examined Petitioner at Central State found him competent to stand trial. (R. 16-17). Counsel then abandoned the special plea because he had no evidence to present and thought it futile to pursue the issue. Thus, Petitioner has raised no bona fide doubt as to his competency and the trial court did not violate Pate through its failure to hold a competency hearing. Chenault v. Stychcombe, 546 F.2d 1191 (5th Cir. 1977).

Accordingly, this allegation is found to be without merit.

16-19

Petitioner's argument that the exclusion for cause of jurors unequivocally opposed to the death penalty violates his right to an impartial jury was rejected in Smith v. Balkcom, 660 F.2d 575 (1981), as well as on appeal, Thomas v. State, 245 Ga. at 690.

20-24

In paragraphs 20-24, Petitioner alleges his Sixth and Fourteenth Amendment rights were violated by the premature exclusion of five jurors under Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

FINDINGS OF FACT

The Supreme Court has already decided jurors Thompson (T. 113-115) and Reese (T. 286-288) were properly excluded for cause. Thomas v. State, 245 Ga. at 690. (See Appellant's Brief, p. 7).

The Court has reviewed the voir dire examinations of jurors Ogletree (T. 37-39), Beachum (T. 68-76), and Watkins (T. 77-78).

CONCLUSIONS OF LAW

Under Witherspoon v. Illinois, supra, a juror may be excluded for cause where he indicates he is irrevocably committed to vote against the death penalty before the trial has begun regardless of the facts and circumstances that might emerge during the proceedings.

The Court finds that the trial court did not abuse its discretion in excluding these three jurors for cause, despite some ambiguity in their answers. The trial Judge was in a much better

position to know what a juror was trying to communicate than this Court sitting on habeas corpus review. For this reason, the Court finds no violation of Witherspoon.

Accordingly, this claim for relief is found to be without merit.

25-27

In paragraphs 25-27, Petitioner claims his trial was conducted in such a manner as to deprive him of his right to a fundamentally fair trial under the Fourteenth Amendment and Georgia Constitution. Specifically, he alleges the State did not notify Counsel of its intent to seek the death penalty until the day of trial; that the notice of aggravating circumstances was not served until the day of trial; that Counsel was not permitted to review the statements of State witnesses before the trial; that the prosecutor led two witnesses through their testimony; that the prosecutor ignored the proper limitations on redirect examination; that the prosecutor bolstered the credibility of her own witnesses; that the State called a witness whose full name had not been given to Counsel until the morning of trial; that the trial court admitted irrelevant testimony from Linda Cook; that the trial court erred in denying motions for mistrial based upon two statements from the victim's mother.

FINDINGS OF FACT

Notice of the State's intent to seek the

death penalty and of aggravating circumstances to be relied upon were given to Counsel prior to the beginning of Petitioner's trial. (T. 4-6; R. 75). Counsel testified that the prosecutor had indicated in pre-trial discussions the death penalty would be asked for if the case went to trial. Counsel further stated that it was obvious to him that the (b)(7) aggravating circumstance was the only one that could apply, so the formal notice coming as late as it did made no difference in his preparation.

Counsel was not given access to the statements of State witnesses prior to trial. (T. 11-13). Counsel was given copies of their statements as they were called. Id.

During the examination of Linda Cook and Enzor Lowe by the prosecutor, Counsel objected numerous times to the prosecutor leading her own witnesses. (T. 353; 354; 376; 378; 379; 386; 396). These objections were ruled upon. Id.

Counsel objected to the prosecutor calling a witness named Roosevelt because Counsel had been given only his first name, no last name or address, on the list of witnesses. (T. 426). The prosecutor stated that she only learned his last name and address from her other witnesses, had him brought to court that morning, and summarized his testimony. (T. 426-427). The trial court recessed to allow Counsel to talk with the witness. (T. 427-429). The

witness, Roosevelt Tysinger, was an eleven-year-old friend of the victim and testified as to when he had last seen the victim. (T. 458-462).

On cross-examination, Counsel asked Linda Cook how she and Petitioner were getting along at the time of the incident and whether they were fighting a lot. (T. 373). Counsel testified that he tried to bring out her resentment against Petitioner on cross-examination. On redirect exam, the prosecutor elicited the fact that Petitioner had kept Ms. Cook locked up for a week in his room at a rooming house. (T. 375-376).

On direct examination, the victim's mother said, "She [Linda Cook] was scared of Donnie Wayne Thomas." (T. 471). The trial court immediately instructed the witness to answer questions precisely and instructed the jury to disregard that testimony. (T. 471-472). On cross-examination, the same witness answered, "First time I met her was two weeks before Donnie Thomas killed my son, or before somebody killed him." (T. 473). The trial court immediately instructed the jury to disregard the testimony and sent the jury out of the courtroom. Id. Counsel moved for a mistrial based on the two statements, but the motions were denied. (T. 474-475). The trial court had the jury brought back in and instructed them at length to disregard the comments. (T. 475-477).

CONCLUSIONS OF LAW

Counsel received "clear notice" of the State's

intent to seek the death penalty in pre-trial discussions with the prosecutor, and such notice is sufficient. Bowden v. Zant, 244 Ga. 260, 263 (1979). Further, the formal written notice, given on the morning before trial, coupled with the previous informal notice is sufficient under Franklin v. State, 245 Ga. 141, 149 (1980).

Statements of witnesses in the prosecutor's file are not subject to a notice to produce, though exculpatory statements from witnesses are subject to disclosure. Wilson v. State, 246 Ga. 62, 65 (1980). Petitioner has not shown there were exculpatory statements which the prosecutor failed to disclose. Thus, the Court finds that the procedure followed in this case of furnishing copies of witnesses' statements to defense counsel as the witnesses were called did not violate his right to a fair trial.

As to Petitioner's complaint that the prosecutor led her own witnesses, the record indicates that defense counsel made objections, and the objections were ruled upon. The Court finds there is no error of which to complain.

Petitioner has also claimed the prosecutor exceeded the scope of permissible redirect examination but has not cited any examples of such. The Court has examined the redirect examination of witnesses by the prosecutor and found nothing improper. The

conduct and extent of redirect examination which follows and is intended to neutralize the effect of cross-examination is left to the sound discretion of the trial court. Morgan v. State, 240 Ga. 845 (1978). Petitioner has shown no abuse of discretion.

Petitioner's allegation that the district attorney bolstered the credibility of her witnesses is completely without merit.

Petitioner has also objected to the State's calling of Roosevelt Tysinger because Counsel did not obtain his last name until the morning the witness testified. The prosecutor stated that Roosevelt's last name and address were newly discovered. (T. 426-427). The trial court recessed to allow defense counsel to interview the witness. Such action by the trial court was permissible. Lakes v. State, 244 Ga. 217 (1979).

The testimony of Linda Cook regarding the fact that Petitioner had kept her locked in his room in a rooming house was elicited by the prosecution on redirect exam after defense counsel had inquired into her relationship with Petitioner and challenged her veracity. The evidence was relevant and admissible on redirect examination. Morgan v. State, supra.

Finally, Petitioner has complained of the trial court's denial of two motions for mistrial based upon voluntary comments by the victim's mother during her testimony. The record reflects the trial judge acted immediately and instructed

the jury to disregard that testimony. Thus, Petitioner has shown no abuse of discretion in the denial of the motions for mistrial. Avery v. State, 209 Ga. 116 (1952); Moore v. State, 228 Ga. 662(4) (1972); Shy v. State, 234 Ga. 816, 824 (1975).

28-30

In paragraphs 28-30, Petitioner asserts that the prosecutor made improper closing arguments during the guilt/innocence phase of trial, which violated his constitutional rights. Specifically, Petitioner complains of the prosecutor's reference to the fact that Petitioner's girlfriend had been locked up in his boarding house room and of the prosecutor's suggestion of motive for the crime.

FINDINGS OF FACT

The Court has examined the closing argument of the prosecutor, (T. 505-514), particularly the portion of which Petitioner complains (T. 510). Following the prosecutor's suggestion of motive, defense counsel objected. Id. The trial court gave a cautionary instruction and overruled the objection. Id.

CONCLUSIONS OF LAW

The Court has concluded that evidence of Petitioner's girlfriend being locked in his room was relevant and admissible. (See paragraphs 25-27). Therefore, the prosecutor's reference to this fact

was not improper.

The prosecutor's suggestion of motive was one inference that could be drawn from the evidence and not an improper reference to facts not in evidence. Wheeler v. State, 220 Ga. 535, 537 (1965); Shy v. State, supra; Garcia v. State, 240 Ga. 796, 800 (1978).

Accordingly, this claim for relief is found to be without merit.

31-32

In paragraphs 31-32, Petitioner charges that the failure to record bench conferences deprived him of his Sixth and Fourteenth Amendment rights and rights under the Georgia Constitution.

FINDINGS OF FACT

Counsel testified that nothing happened of significance at bench conferences.

CONCLUSIONS OF LAW

The court reporter's failure to transcribe all bench conferences in a death penalty case does not constitute reversible error per se where the appellant does not demonstrate any harm or prejudice resulting therefrom. Davis v. State, 242 Ga. 901 (1979). Petitioner has made no such showing.

Accordingly, this allegation is without merit.

33-34

In paragraphs 33-34, Petitioner alleges that the introduction into evidence of his prior convictions

in the sentencing phase violated his Eighth and Fourteenth Amendment rights and rights under the Georgia Constitution.

FINDINGS OF FACT

Counsel filed a Motion in Limine to prohibit the introduction of Petitioner's prior convictions. (R. 36). The prosecutor stated that she did not intend to introduce them in the case-in-chief unless Petitioner placed his character in issue. (T. 9-10).

Prior to the beginning of the sentencing phase, the trial court conducted a hearing outside the presence of the jury on the admissibility of Petitioner's prior convictions. (T. 551-555). The trial court found the convictions were admissible. Id.

CONCLUSIONS OF LAW

Prior convictions are admissible in the pre-sentence hearing in capital cases under Ga. Code Ann. §27-2503, provided the State has given notice to the defendant of its intent to use the prior convictions as evidence. Corn v. Hopper, 244 Ga. 28 (1979); Fair v. State, 245 Ga. 868, 873-74 (1980).

Here, the record does not indicate whether Petitioner was given formal, written notice of the State's intent to introduce the prior convictions, but the statute does not require formal, written

notice. Cf. Ga. Code Ann. §27-2503. Clear notice is all that is required. Hewell v. State, 238 Ga. 578, 580 (1977); Bowden v. Zant, supra, at 263. It is readily apparent that defense counsel for Petitioner was aware of the prior convictions since he filed a motion in limine to bar their introduction.

Accordingly, this claim for relief is found to be without merit.

35-38

In paragraphs 35-38, Petitioner claims that the jury instruction on malice in the guilt/innocence phase was impermissibly burden-shifting under Sandstrom.[1]

FINDINGS OF FACT

The Court has examined the jury instruction on malice. (T. 504).

CONCLUSIONS OF LAW

Petitioner's argument that the statutory definition of malice murder is burden-shifting was rejected in Burney v. State, 244 Ga. 33, 39 (197(), and Franklin v. State, 245 Ga. 141(9)(1980).

Accordingly, this allegation is found to be without merit.

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[1] Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

39-45

In paragraphs 39-45, Petitioner alleges that the jury instructions in the sentencing phase failed to guide the jury as to the proper application of the Ga. Code Ann. §27-2534.1(b)(7) aggravating circumstance and as to mitigating circumstances.

FINDINGS OF FACT

The Supreme Court expressly upheld the finding of the (b)(7) aggravating circumstance. Thomas v. State, Addendum, 247 Ga. at 234. Implicit in this finding is the conclusion that the jury charge sufficiently channeled the jury's discretion because the Court noted, "Speculation as to the jury's interpretation of the statute by the reviewing court is not required, thereby allowing rational review." Id.

The trial court instructed the jury to consider "any evidence of mitigating circumstances" in arriving at its verdict as to sentence, that they were not required to recommend death even if they found an aggravating circumstance to exist, and that the sentence to be imposed was a matter entirely within the jury's discretion so that they could recommend a life sentence "for any reason that is satisfactory to you, or without any reason, if you care to do so." (T. 567-568).

CONCLUSIONS OF LAW

The jury received clear instructions on mitigating circumstances and the option to recommend against death, comporting with Spivey v. Zant, 661 F. 2d 464 (1981).

Accordingly, this claim for relief is found to be without merit.

46-49

Contrary to Petitioner's assertion, the Supreme Court has already concluded the (b)(7) aggravating circumstance was properly applied. Thomas v. State, Addendum, 247 Ga. at 234.

56-57

Petitioner has not shown his death sentence was the result of intentional discrimination in order to establish his allegation that the death penalty is being discriminatorily imposed on the basis of race, sex, and poverty. Smith v. Balkcom, 660 F.2d 573 (1981).

58-61

Petitioner's argument that the Georgia capital sentencing review procedure is constitutionally defective was rejected in Smith v. Balkcom, supra.

62-63

Petitioner's challenge to the use of electrocution as the means of execution is without merit.

WHEREFORE, all allegations in the amended petition having been found to be without merit, the petition, as amended, is denied.

This 8 day of March, 1982.

Alex Crumbley

ALEX CRUMBLEY
JUDGE SUPERIOR COURTS
FLINT JUDICIAL CIRCUIT

Application No. 2037

SUPREME COURT OF GEORGIA

ATLANTA, June 2, 1982

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

DONALD WAYNE THOMAS V. WALTER D. ZANT, WARDEN

Upon consideration of the application for a certificate of probable cause to appeal filed in this case, it is ordered that it be hereby denied. All the Justices concur, except Weltner, J., disqualified.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Joline B. Williams, Clerk.

Grady Memorial Hospital

June 4, 1979

80 Butler Street, SE, Atlanta, Georgia 30303, Telephone 404 659-1212

Tr cal 6-25

The Honorable Charles L. Weltner, Judge
Fulton County Superior Court
Atlanta Judicial Circuit
136 Pryor Street, SW
Atlanta, Georgia 30303

Re: Mr. Donald Wayne Thomas

Dear Judge Weltner:

Mr. Donald Wayne Thomas, Indictment #A-44518, was evaluated on June 1, 1979 pursuant to a court order received on May 23, 1979. The following comments reflect a summary of the observations obtained during the course of the interview with Mr. Thomas. There was no additional history or background information available at the time of the evaluation.

PURPOSE OF EVALUATION: Mr. Thomas was informed that the evaluation had been requested by the court and that a summary of observations would be forwarded to the court for its potential use in the disposition of his case. In response to a question regarding his understanding of the charges against him, he stated "I-turned myself in on an assault case and they came out here and said I killed a little white boy."

MENTAL STATUS EXAMINATION: Mr. Thomas presented as an alert, rather slender black male dressed in an institutional green jumpsuit, unkempt in his appearance and exhibiting poor personal hygiene. He sat rigidly in his chair staring past the examiner and demonstrated little spontaneity in response to questions. He stated that he had no idea of the month or the day and when asked the year he acknowledged his identity and stated that "I'm in the jail, big rock jail in Atlanta." His speech was characterized by tangential to loose associations, however, he denied experiencing delusional ideations and/or perceptual distortions in the form of either auditory of visual hallucinations. His affect was markedly flattened and his mood was depressed, without evidence of overt suicidal or homicidal ideation. As the interview progressed, and he was questioned more closely regarding his current mental status, he became increasingly restless and agitated, eventually ceasing to respond to questions while rocking back and forth in the chair and rubbing his genitals with his hands. His objective judgment was determined to be significantly impaired as a result of his markedly inappropriate behavior. His insight was considered to be nil. As a result of his inability to respond to questioning, the clinical interview was terminated.

I was unable to elicit any substantial family or personal history as a result of his mental status, however the above noted observations are clearly indicative of a diagnosis of Schizophrenia. In the absence of history to the contrary, I must assume that this psychotic behavior is a manifestation of an acute process. Clinical recommendations would include the transfer of Mr. Thomas to an inpatient psychiatric facility in the interest of eliminating his psychotic symptoms. He was placed on Thorazine

BOOK 861 PAGE 330

50 mgs. twice a day at the close of the interview.

FORENSIC CONSIDERATIONS: Mr. Thomas appeared aware of the charges against him, however as a result of his psychotic state, he did not appear to appreciate his role in the proceedings pending before him nor was he able to communicate effectively with this examiner. It is my impression that Mr. Thomas, as a result of psychotic decompensation, is unable to actively participate in the legal proceedings against him and is so substantially impaired as a result of psychiatric symptoms as to be unable to assist his attorney in the preparation and implementation of his defense.

I am unable to offer an opinion regarding his mental status at the time of the alleged offenses, as his state of disorganization was of such a degree that he was unable to offer any coherent statements regarding the offense.

Respectfully,

Lloyd T. Baccus, M.D.
Director, Inpatient Psychiatry
Psychiatry & Law Service

LTB:reb

cc: Ms. Carole E. Wall
Asst. District Attorney

Mr. Robert H. Coker
Public Defender

SHELDON B. COHEN, M. D.
604 PEACHTREE MEDICAL BUILDING
401 PEACHTREE STREET, N. E.
ATLANTA, GEORGIA 30308

Telephone 523-4633

August 8, 1979

Honorable Charles L. Weltner
Judge, Superior Court
Atlanta Judicial Circuit
Fulton County Courthouse
Atlanta, Georgia 30303

Re: Donald Wayne Thomas
Indictment No. A-44518

Dear Judge Weltner:

Pursuant to your order of 7 August 1979, Mr. Thomas, who is accused of murder, was seen in psychiatric consultation to determine his capacity to cooperate meaningfully with counsel and to stand trial.

Mr. Thomas was brought to my office ahead of time by two Sheriff's deputies. He sat quietly in the waiting room until I called him. He is a 19 year old, single, Negro male who apparently had been employed regularly as an unskilled laborer in a restaurant for several years.

I explained the purpose of the interview and asked him what he understood it to be and he said, "You are supposed to be a doctor and they say I am crazy, I reckon." However, he said he didn't think he was crazy. He said that he had been in jail for some time, having given himself up "for an assault case." He said that he knew he had done something wrong and he wanted to get it over with.

When asked for details of the assault charges, he said that it was over with, that it was in the past and he did not want to talk about it. When asked about murder charges, he stated that he had been in court on the assault charges and that someone telephoned the court saying that he had committed murder, that they went out and looked for the body and found it. He said the call must have been from someone who did not like him and that he did not have anything to do with this incident, that he had been in jail at the time. He continually denied knowing anything about the murder of a nine year old white boy and strongly implied that many of his difficulties were because his ex-girl friend, Linda Cook, was angry with him and would do anything to hurt him. He said this was because of urinary incontinence present for seven years and that she and others made fun of him because of this.

He was able to give me fundamental, historical information about his mother, four brothers and his work history.

During the interview he was at times angry, negativistic and provocative; for example, smoking a cigaret in the waiting room despite a sign on the door asking people to not smoke. He initially seemed to be pretending not to understand or comprehend anything that was asked of him; for example, when asked if he would like a Coca-Cola or coffee, he looked up and said, "What is that?" Later, as he began talking and became less defensive it was quite apparent that he was very much aware of such phenomenon and he asked if he could have a piece of candy which he noted in a jar in my office.

The interview conducted by Dr. Baccus in early June showed apparently quite different behavior, so that he seemed unresponsive to simple, every day questions. He apparently was placed on a tranquilizer (Thorazene 100 mgs. daily) and this may account for the difference in manner and behavior at this time. It is of course also possible that he may have simulated more in the previous interview than he did today.

At this time I cannot arrive at either a definitive diagnosis or answer the questions as to his mental capacity to assist in his own defense and to stand trial. There is conflicting information from the Grady interview and that which I obtained today. Consequently, I would recommend extended observation at Central State Hospital in order to clarify these factors.

Thanking you for asking me to see Mr. Thomas, I am

Sincerely,

Sheldon B. Cohen

Sheldon B. Cohen, M. D.

SBC:hcm
Encl.

FORENSIC SERVICES DIVISION

CENTRAL STATE HOSPITAL

Milledgeville, Georgia 31062

September 24, 1979

(912) 453-4381

A 44518

Honorable Charles L. Weltner
Judge, Superior Court
Atlanta Judicial Circuit
Courthouse
Atlanta, Georgia 30303

Re: Thomas, Donald Wayne
Case No. 228,112
Fulton County
Binion 2 South

Dear Judge Weltner:

Mr. Donald Wayne Thomas was admitted to the Forensic Services Division of Central State Hospital on August 27, 1979 by Order of your Court. We understand that he is charged with Murder. Your Order states that the defendant may be presently incompetent to participate in his defense and that because of conflicting reports from two other psychiatrists, further evaluation by the court is requested.

The physical examination was unremarkable. Neurological examination including brain scan, skull series, electroencephalogram and neurological consultation are all within normal limits. All routine laboratory procedures were within normal limits. The chest x-ray was negative. Although Mr. Thomas has had vague urinary complaints, his urinalysis has been within normal limits.

On admission, Mr. Thomas was noted to be tense, anxious and nervous. His speech was logical, relevant, coherent and goal directed. However, he was somewhat guarded and did not volunteer any information. His psychomotor activity was a little decreased and he spoke in a very low tone. His affect was somewhat flat. He was partially oriented. He denied hallucinations, delusions and suicidal thoughts. Psychological testing reveals he functions in the Borderline range of intelligence. Personality testing suggests the presence of a thought disorder, which resembles that of a schizophrenic process. Based on our examination, evaluation, and information available to us, he has been given the diagnosis of Latent Schizophrenia. He gives no other history of psychiatric treatment.

Based on our examination and evaluation, we have concluded that he is aware of the charge pending against him and the possible consequences. He is able to relate to his attorney in the preparation of his defense. Therefore, we consider him competent to stand trial.

FILED IN OFFICE

SEP 27 1979

DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY GEORGIA

BOOK 887 PAGE 33

As to his degree of criminal responsibility, it is our opinion that he is able to distinguish between right and wrong, and was not acting under the influence of a compulsive delusion which overmastered his will to resist committing the alleged offense.

Please send a duly authorized person for him at your earliest convenience.

Very truly yours,

Jose M. Delaterre, M.D.
Medical Director
Forensic Services Division

JMD:id

cc: Honorable Lewis R. Slaton (Enclosed)
Defense Counsel (Enclosed)

[INSTRUCTIONS PRIOR TO PENALTY PHASE OF TRIAL:]

THE COURT: Members of the jury, it is my duty as the Presiding Judge to instruct you now as to the law governing the sentencing phase of this case. The instructions given you earlier in this case and the rules of law outlined to you in this portion of the instructions apply also to your deliberations as to penalty.

The law of Georgia provides that the death penalty may be imposed in certain cases provided that the jury finds beyond a reasonable doubt that the offense for which the accused was convicted was committed under what the law describes as statutory aggravating circumstance.

In this case the State contends that the offense of murder for which the accused has been convicted was outrageously and wantonly vile, horrible and inhuman, in that it involved torture and depravity of mind.

Such a circumstance is defined as a

statutory aggravated circumstance under the law of this state.

Members of the jury, you have found this defendant guilty of the offense of murder, and you may recommend one of two sentences as punishment, if you believe beyond a reasonable doubt that the offense was committed under the aggravated circumstance or circumstances as contended by the State. If you do so find, you may recommend that this defendant be put to death by adding to your verdict, "We recommend death and find the following statutory aggravated circumstances beyond a reasonable doubt," and you must set forth in writing the aggravated circumstances which you find to exist.

If you do add that recommendation, the accused will be sentenced to be put to death in the manner provided by law, which in this state is electrocution.

The other punishment which you may recommend in this case is life imprisonment. If you do not believe beyond a reasonable doubt that this defendant should be put to death, you would return a verdict as follows:

"We recommend life." The effect of this sentence would be that the Court would sentence this accused to life imprisonment.

Now, members of the jury, you should consider all evidence submitted in both phases of the trial of this case in arriving at your verdict as to the sentence to be imposed. This would include any evidence of mitigating circumstances received by you in this case.

Members of the jury, even if you find beyond a reasonable doubt that the State has proved the existence of aggravating circumstances in this case, which would justify the imposition of a death sentence, you are not required to recommend that the accused be put to death. You would be authorized, under these circumstances, to recommend the death penalty, but you are not required to do so. The sentence to be imposed in this case is a matter entirely within your discretion, and you may provide for a life sentence for this accused for any reason that is satisfactory to you, or without any reason, if you care to do so.

The law vests the exclusive right with the jury to either make or withhold a

recommendation for the death sentence.

Of course, if the State has failed to prove beyond a reasonable doubt that the offense was committed under the aggravated circumstances described to you, you are not authorized to recommend the death penalty. Without such a finding the death penalty cannot be imposed. In that event, your verdict would be, "We recommend life," the effect of which would be that the Court would sentence this defendant to life in prison.

The law requires that the Presiding Judge give to the jury certain instructions in writing and that the jury, if its verdict be a recommendation of death, shall designate in writing the aggravated circumstance or circumstances which it finds to exist beyond a reasonable doubt.

I will give you this written charge.

Now, Ladies and Gentlemen, in the event that you recommend the death penalty in this case, you must write out the recommendation of your findings as to any statutory aggravated circumstances in the form which I have given

to you in these instructions.

Your verdict must be unanimous; that is, agreed to by all 12 of your members. It must be in writing, dated, and signed by your foreman.

You may retired to consider your verdict. The alternates will kindly stand aside.

(Whereupon the jury retired to the jury room, at 4:20 p.m.)

THE COURT: Any exceptions?

MS. WALL: I have none, Your Honor.

MR. COKER: Your Honor, at this time, Your Honor, however, I would specifically reserve any objections.

THE COURT: I see. All right. Any exceptions are, of course, reserved.

Do you want to look at that?

MR. COKER: Okay.

(At 5:44 p.m. the following transpired.)

THE COURT: Now, for the record, it being about 5:45 p.m., I have this question. "May you advise us the soonest a person can be released if given a life sentence?" I propose to answer that as follows: "I am not permitted to answer this question. Signed."

82-5328

No. 81-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

DONALD WAYNE THOMAS
Petitioner,

-against-

WALTER D. ZANT, Superintendent
Georgia Diagnostic and
Classification Center,
Respondent.

MOTION TO PROCEED IN FORMA PAUPEIS

Petitioner, Donald Wayne Thomas, through counsel, respectfully moves this Court for leave to proceed in forma pauperis pursuant to Rule 46 of the Rules of this Court.

In support of his motion, petitioner states as follows:

1. The petitioner is incarcerated on death row in Jackson, Georgia. He has been incarcerated since April, 1979, and during the period of his incarceration he has not had any income from any source. Petitioner's affidavit in support of this motion is appended hereto.

2. Petitioner's application to proceed in forma pauperis in the court below was granted by the Superior Court of Butts County. Petitioner was represented in the court below and is represented in this Court by volunteer counsel on a pro bono basis.

WHEREFORE, petitioner prays that he be permitted to proceed in forma pauperis in this Court.

Respectfully submitted,

Stephen B. Bright
419 7th Street, N.W., Suite 202
Washington, D.C. 20004
(202)638-4798

Counsel for petitioner

No. 81

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

DONALD WAYNE THOMAS,

Petitioner,

-against-

WALTER D. ZANT

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, DONALD WAYNE THOMAS being first duly sworn, depose and say that I am the Petitioner in the above entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. Yes____ No ✓

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. 1979 1,50

[redacted]

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? Yes____ No✓

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? Yes____ No✓

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes____ No✓

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons. None____

MRS ANNIE R. THOMAS. MY MOTHER

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Donald W. Thomas
DONALD WAYNE THOMAS

STATE OF GEORGIA

COUNTY OF BUTTS

SUBSCRIBED AND SWORN TO
before me this the 29 day of July, 1982

Notary Public

My Commission expires:
9-10-83

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 82-5328

DONALD WAYNE THOMAS,

Petitioner,

v.

WALTER D. ZANT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF BUTTS COUNTY, GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

JANICE G. HILDENBRAND
Staff Assistant Attorney General
Counsel-of-Record for Respondent

MICHAEL J. BOWERS
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

MARION O. GORDON
Senior Assistant
Attorney General

WILLIAM B. HILL, JR.
Senior Assistant
Attorney General

Please serve:

JANICE G. HILDENBRAND
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-6344

QUESTIONS PRESENTED

I.

Whether Petitioner was denied due process of law because the trial court did not conduct an evidentiary hearing as to his competency to stand trial where no bona fide doubt as to Petitioner's competency was raised?

II.

Whether the trial court's instructions at the sentencing phase regarding the statutory aggravating circumstance adequately channeled the jury's consideration of the death penalty?

III.

Whether the Georgia Supreme Court constitutionally applied and limited the terms "torture" and "depravity of mind" in upholding the aggravating circumstance which supports the death penalty in this case?

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SUPREME COURT OF THE UNITED STATES

NO. 82-5328

DONALD WAYNE THOMAS,

Petitioner,

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Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF BUTTS COUNTY, GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

PART ONE

STATEMENT OF THE CASE

Petitioner was indicted in Fulton County, Georgia, in May, 1979, for the murder of a nine year old boy. Following a trial by jury, Petitioner was convicted of murder, and the jury imposed the death sentence on October 25, 1979. On direct appeal, the Georgia Supreme Court affirmed the conviction and death sentence. Thomas v. State, 245 Ga. 688, 266 S.E.2d 499 (1980). After this court's decision in Godfrey v. Georgia, 446 Ga. 420 (1980), the death sentence in this case was vacated and the case was remanded by this Court to the Georgia Supreme Court for reconsideration in light of the Godfrey decision.

Thomas v. State, 449 U.S. 988 (1980). Upon remand, the Georgia Supreme Court reaffirmed the death sentence. Thomas v. State, 247 Ga. 233, 275 S.E.2d 318 (1981), cert den., 452 U.S. 973 (1981).

Petitioner next sought State habeas corpus relief which was denied by the Superior Court of Butts County, Georgia in a lengthy, unpublished opinion. (See Petitioner's Appendix). On June 2, 1982, the Georgia Supreme Court denied Petitioner's application for a certificate of probable cause to appeal.

PART TWO

SUMMARY OF ARGUMENT

I.

The trial court was not constitutionally required to conduct an evidentiary hearing on the question of Petitioner's competency to stand trial because there was no evidence of prior irrational behavior, Petitioner's trial demeanor did not raise any doubt as to his competency and the one psychiatrist who found Petitioner incompetent to stand trial four months prior to trial abandoned that opinion in the week preceeding trial.

II.

The trial court's instructions, at the sentencing phase, regarding the statutory aggravating circumstance, which parallelled the statutory language properly guided the sentencing authority's discretion in accordance with this Court's decisions.

III.

The Georgia Supreme Court's detailed opinion, on remand from this Court, which upheld the application of the (b)(7) aggravating circumstance, did not employ an unconstitutionally overbroad definition of "torture" and "depravity of mind."

PART THREE

REASONS FOR NOT GRANTING THE WRIT

I. THE TRIAL COURT WAS NOT CONSTITUTIONALLY REQUIRED TO PROVIDE THE PETITIONER WITH AN EVIDENTIARY HEARING ON THE ISSUE OF COMPETENCY TO STAND TRIAL.

Petitioner maintains that he was deprived due process of law because an evidentiary hearing on his competency to stand trial was not conducted in the trial court. Respondent maintains that under the relevant criteria set forth in the decisions of this Court, no bona fide doubt as to Petitioner's competency was raised.

The record in the present case indicates that the trial court ordered a psychiatric examination of Petitioner within one week of Petitioner's arrest. (R. 5). Pursuant to this Order, Petitioner was examined on June 1, 1979 by Dr. Baccus who concluded that Petitioner was "unable to actively participate in the legal proceedings" and recommended treatment at an in-patient psychiatric facility. (R. 6-7). Petitioner's attorney then entered a special plea of insanity and filed a Motion for Transfer to a State psychiatric facility. (R. 8-11). On or about August 7, 1979, Petitioner was examined by a second psychiatrist, Dr. Cohen, who was unable to reach a definitive conclusion regarding Petitioner's ability to assist in his defense and Dr. Cohen suggested extensive observation at a State hospital. (R. 14-15). Dr. Cohen noted that Petitioner "initially seemed to be pretending not to understand to comprehend anything that was asked of him" and suggested that Petitioner might have simulated to a greater extent at his earlier interview with Dr. Baccus.

Respondent maintains, as the State habeas court concluded, that none of these factors are present here. There is no contention that Petitioner has a history of irrational behavior, to the contrary, Petitioner's numerous witnesses at the State habeas hearing testified without exception that they characterized Petitioner as "normal." Petitioner argues that his demeanor at trial raised doubts because Petitioner continually exhibited a raised fist while sitting at the defense table; however, Petitioner's attorney characterized this gesture as similar to a black power salute and did not equate it with incompetency. (H.T., p. 61). Finally, the report of the psychiatrist, who had the opportunity to observe Petitioner over a one month period immediately preceding trial, specifically found Petitioner competent to stand trial. The psychiatrist who found Petitioner incompetent to stand trial over four months before trial had opined that transfer to an in-patient psychiatric facility could eliminate Petititioner's "psychotic symptoms" which rendered him incompetent to stand trial in early June, 1979.

Accordingly, no bona fide doubt having been raised regarding Petitioner's competency at the time of trial, Petitioner's contention that an evidentiary hearing was constitutionally mandated is without merit.

(R. 14). After receiving Dr. Cohen's letter, the trial judge ordered that Petitioner be transferred to Central State Hospital on August 10, 1979. (R. 13). After approximately one month at the State facility, Dr. Delatorre concluded that Petitioner was competent to stand trial, able to distinguish right from wrong and not laboring under delusion at the time of the incident. (R. 16-17). Dr. Delatorre also noted that Petitioner was in the boarderline classification in terms of intelligence, had no history of prior psychiatric disturbances and was diagnosed as a latent schizophrenic. Id. Petitioner's trial attorney testified at the State habeas hearing that in the week before trial, Dr. Baccus told him that Petitioner was competent to stand trial, therefore, the special plea was abandoned due to lack of evidence. ("H.T.", pp. 16, 52).

Relying on the earlier decision in Pate v. Robinson, 383 U.S. 375 (1966), this Court has identified three pertinent factors in determining whether further inquiry as to the accused's competency to stand trial is constitutionally mandated:

> The import of our decision in Pate v. Robinson is that evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but that even one of these factors standing alone may, in some circumstances, be sufficient. Drope v. Missouri, 420 U.S. 162, 180 (1975).
>
> Also see Chenault v. Stynchcombe, 546 F.2d 1191 (1977), cert den., 434 U.S. 878 and Pedrero v. Wainwright, 590 F.2d 1383 (1979), cert den., 444 U.S. 943.

II. THE TRIAL COURT'S INSTRUCTIONS AT THE SENTENCING PHASE ADEQUATELY GUIDED AND CHANNELED THE JURORS' CONSIDERATION OF THE DEATH PENALTY.

Petitioner maintains that the trial judge's instructions at sentencing, regarding aggravating circumstances, are constitutionally insufficient and that the Eighth Amendment requires more than an instruction in the statutory language.

At the sentencing phase, the trial judge instructed the jury that the death penalty may be imposed if the jury finds beyond a reasonable doubt the existence of a statutory aggravating circumstance. (T.T., p. 565). The trial judge continued:

> In this case the state contends that the offense of murder for which the accused has been convicted was outrageously and wantonly vile, horrible and inhuman in that it involved torture and depravity of mind. (T.T. 565).

This instruction is essentially the statutory language of Ga. Code Ann. § 27-2534.1(b)(7).

Petitioner argues, without benefit of authority, that instructions couched in the statutory language of (b)(7) are constitutionally insufficient to guide the sentencing authority's discretion. This court has implicitly rejected this argument in both the Gregg and Godfrey decisions. See Gregg v. Georgia, 428 U.S. 153 (1976) and Godfrey v. Georgia, 446 U.S. 420 (1980). In Gregg, the Petitioner's argument that the (b)(7) language was unconstitutionally broad, was rejected by this Court's opinion

which concluded "But this language need not be construed in this way." Gregg v. Georgia, supra, 428 U.S. at 201. In the Godfrey opinion, this Court again considered the (b)(7) aggravating circumstance but did not mandate instructions to the jury beyond that set forth in the statute. In Godfrey, the jury simply found that the murders were "outrageously or wantonly vile, horrible and inhuman," which lead this Court to the conclusion that their discretion was impermissibly unchanneled. Godfrey v. Georgia, supra, 446 U.S. at 428-29. In the present case, the jury returned the following finding:

> We, the jury, recommend death and find the following statutory aggravated circumstances beyond a reasonable doubt: That choking and strangling of a nine year old child causing asphyxiation by the defendant, was outrageously and wantonly vile, horrible and inhuman, in that it involved torture and depravity of mind. (T.T., p. 571 and R. 116, 118).

This finding clearly indicates the facts which lead the jury to conclude that the murder involved torture and depravity, as well as being outrageously wanton and vile.

Based on the foregoing, Petitioner does not present any argument which merits consideration by this Court.

III. THE GEORGIA SUPREME COURT EMPLOYED A PROPERLY LIMITED AND NARROW CONSTRUCTION TO THE TERMS "TORTURE" AND "DEPRAVITY OF MIND" IN UPHOLDING THE AGGRAVATING CIRCUMSTANCE RETURNED BY THE JURY.

As previously noted, this Court remanded this case for further consideration in light of Godfrey v. Georgia, supra. In response to this Court's dictate, the Georgia Supreme Court reexamined the finding of an aggravated circumstance in the present case and in an extensive discussion upheld the finding.

On remand, the Georgia Supreme Court relied on its recently enunciated guidelines in Hance v. Georgia, 245 Ga. 856, 268 S.E.2d 339 (1980), cert den., 449 U.S. 1067. In Hance v. Georgia, the Court held that serious physical abuse prior to death constitutes "torture" under Ga. Code Ann. § 27-2534.1(b)(7), that the act of torture is evidence of depravity and that the victim's age and physical characteristics should be considered in determining depravity. The Court relied on the record in this case which indicated that Petitioner beat the victim with a stick and choked him to death, the victim's tender age (9 years) and slight physical build, as well as, Petitioner's action of jumping on the corpse in the presence of his girlfriend as indicative of torture and depravity shown beyond a reasonable doubt. See Thomas v. Georgia, supra, 247 Ga. 233.

This analysis by the Georgia Supreme Court clearly reveals that the State Court has properly applied the (b)(7) aggravating circumstance under guidelines which distinguish cases such as the present, from the run of "ordinary murders" in which the death penalty should not be imposed.

Accordingly, Petitioner's argument regarding the Georgia Supreme Court's application and construction of the (b)(7) aggravating circumstance does not warrant review by this Court.

CONCLUSION

For the above and foregoing reasons, Respondent respectfully requests that this Court deny the petition for a writ of certiorari filed on behalf of the Petitioner, Donald Wayne Thomas.

Respectfully submitted,

JANICE G. HILDENBRAND
Staff Assistant Attorney General
Counsel-of-record for Respondent

MICHAEL J. BOWERS
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

MARION O. GORDON
Senior Assistant
Attorney General

WILLIAM B. HILL, JR.
Senior Assistant
Attorney General

Please serve:

JANICE G. HILDENBRAND
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-6344

CERTIFICATE OF SERVICE

I, JANICE G. HILDENBRAND, a member of the Bar of the Supreme Court of the United States and counsel-of-record for the Respondent, hereby certify that in accordance with the rule of the Supreme Court of the United States, I have this day served a true and correct copy of this brief in opposition for the Respondent upon the Petitioner's counsel by depositing a copy of the same in the United States Mail with adequate postage and properly addressed to:

Mr. Stephen B. Bright
Suite 202
419 7th Street, N.W.
Washington, D.C. 20004

This 29th day of September, 1982.

Janice G. Hildenbrand
JANICE G. HILDENBRAND
Counsel-of-record for Respondent

Accordingly, Petitioner's argument regarding the Georgia Supreme Court's application and construction of the (b)(7) aggravating circumstance does not warrant review by this Court.

CONCLUSION

For the above and foregoing reasons, Respondent respectfully requests that this Court deny the petition for a writ of certiorari filed on behalf of the Petitioner, Donald Wayne Thomas.

Respectfully submitted,

Janice G. Hildenbrand

JANICE G. HILDENBRAND
Staff Assistant Attorney General
Counsel-of-record for Respondent

MICHAEL J. BOWERS
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

Marion O. Gordon by MJB

MARION O. GORDON
Senior Assistant
Attorney General

William B. Hill, Jr. by MJB

WILLIAM B. HILL, JR.
Senior Assistant
Attorney General

Please serve:

JANICE G. HILDENBRAND
132 State Judicial Bldg.
40 Capitol Square, S.W.
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I, JANICE G. HILDENBRAND, a member of the Bar of the Supreme Court of the United States and counsel-of-record for the Respondent, hereby certify that in accordance with the rule of the Supreme Court of the United States, I have this day served a true and correct copy of this brief in opposition for the Respondent upon the Petitioner's counsel by depositing a copy of the same in the United States Mail with adequate postage and properly addressed to:

Mr. Stephen B. Bright
Suite 202
419 7th Street, N.W.
Washington, D.C. 20004

This 29th day of September, 1982.

Janice G. Hildenbrand
JANICE G. HILDENBRAND
Counsel-of-record for Respondent

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 82-5328

DONALD WAYNE THOMAS,

Petitioner,

v.

WALTER D. ZANT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF BUTTS COUNTY, GEORGIA

CERTIFICATE OF FILING UNDER RULE 28

I, JANICE G. HILDENBRAND, A Member of the Bar of the Supreme Court of the United States, hereby certify and swear that I personally deposited in a United States Post Office on September 29, 1982 with first-class postage pre-paid and properly addressed to the Clerk of this Court, within the time for filing, an envelope containing the Brief for the Respondent in Opposition on the above-styled case.

Janice G. Hildenbrand
JANICE G. HILDENBRAND

Sworn to and subscribed
before me this 29th day
of September, 1982.

Dan Lawson
NOTARY PUBLIC

My Commission Expires:

Notary Public, Georgia, State at Large
My Commission Expires June 11, 1984